UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

DEBRA TIETJEN, individually and as the SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES TIETJEN, the ESTATE OF JAMES TIETJEN, on

behalf of themselves and all others similarly situated,

PLAINTIFFS,

v. CASE NO. 2:16-cv-01542

MARIAN NINNEMAN, MILWAUKEE COUNTY

and

EMPLOYEE MEMBERS' RETIREMENT SYSTEM OF THE COUNTY OF MILWAUKEE,

DEFENDANTS.

**PLAINTIFFS' BRIEF IN OPPOSITION TO RULE 12(b)(6) MOTIONS TO DISMISS OF DEFENDANT EMPLOYEES' RETIREMENT SYSTEM**

**OF THE COUNTY OF MILWAUKEE (ERS)**

In support of its Rule 12(b)(6) Motions to Dismiss the ERS makes 2 arguments for dismissal: (A) Plaintiffs have failed to allege what process was due to him which Defendants' conduct has denied to him, (B) Plaintiffs have not exhausted their administrative remedies.

These arguments of Defendant ERS ignore that for purposes of its Motion that it concedes all of the factual allegations in the AMENDED COMPLAINT, as discussed below.

1. **Plaintiffs have alleged the due process the Defendants owe to James Tietjen1 and the wrongful conduct of the ERS which denied that due process to him.**

For purposes of considering a party's Motion to Dismiss the moving party is deemed to admit all of the allegations in the Complaint and all reasonable inferences therefrom. A complaint should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts to support his claim for relief:

It is well settled that, when reviewing the grant of a motion to dismiss, we must assume the truth of all well-pleaded factual allegations and make all possible inferences in favor of the plaintiff. *Janowsky v. United States,* 913 F.2d 393, 395 (7th Cir. 1990); *Rogers v. United States,* 902 F.2d 1268, 1269 (7th Cir. 1990). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-

46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Prince *v.* Rescorp Realty, 940 F. 2d 1104, 1106. (7t h Cir 1991).

To properly plead a Due Process claim in a §1983 action the plaintiff must sufficiently allege that (1) he had a cognizable property interest, (2) that he was deprived of that property interest, and (3) that the deprivation was without due process. **Mann *v.* Meldon Vogel,** 707 F. 3d 872, 877, (7t h Cir).

* 1. **James Tietjen has a cognizable property interest in his pension benefit calculated using 32.30056 years of service credit.**

1 Plaintiffs consist of the Estate of James Tietjen, for the damages caused to him by Defendants conduct during his life, and his widow, Debra Tietjen, for the damages caused to her marital property interest during James Tietjen's life, the damages caused to her interest as the beneficiary of James Tietjen's pension benefit, and for all others in the putative class similarly situated. Since the Cause of Action for each is based upon what Defendants did to James

Tietjen during his life, for convenience in this Brief discussion of the Defendants' conduct towards the Plaintiffs (alleged in 1 38 of the AMENDED

COMPLAINT to have been to all Milwaukee County retirees over the last 25 years) will be made by reference to Defendants' conduct towards James Tietjen.

his accrued.retirement benefits. Plaintiffs have alleged, and the ERS must concede:

Plaintiffs have properly alleged a cause of action against the Defendants for infringement of James Tietjen's constitutionally protected right to the due process of the Defendants obtaining his consent before diminishing or impairing his property right interest in

* + 1. That the ERS is subject to Chapter 138 of the Laws of 1945 which provide, in part, that James Tietjen had "a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent11 • (AMENDED COMPLAINT, **1113-4);**
    2. That James Tietjen accrued 32.30056 years of service credit, to

be used in the calculation of his retirement benefit, by the time of his retirement in June, 2012. (AMENDED COMPLAINT, **1** 19);

* + 1. That on June 21, 2012 Defendants advised JAMES TIETJEN regarding

the options he had with regard to retirement benefits that he had accrued 32.30056 years of service credit. (AMENDED COMPLAINT, 1 19);

* + 1. That years of service credit accrued during a Milwaukee County

employee's employment by Milwaukee County are used to calculate that employee's retirement benefits. (AMENDED COMPLAINT, 1 20);

* + 1. That the number of years of service credit Defendants advised each employee he or she had was a significant determining factor in the calculation by each employee member of the Plaintiff Classes

of such member's retirement benefits and determining when to

retire. (AMENDED COMPLAINT, 1 21);

* + 1. That in their June 21, 2012 advice referred to in **1** 19 above Defendants did not advise JAMES TIETJEN that the number 32.30056 for his years of service credit were an estimate or an inexact

number as of that date. (AMENDED COMPLAINT, **1** 22);

* + 1. That in reliance upon such advice from the Defendants on July 23, 2012 JAMES TIETJEN selected retirement benefits Option 3. (AMENDED

COMPLAINT, **1** 23.

* + 1. That by reason of such conduct on the part of Defendants JAMES TIETJEN obtained a vested, constitutionally protected property right interest in the retirement benefits he selected, Option 3, based upon his or her years of service credit of at least 32.30056

as of June 21, 2012. (AMENDED COMPLAINT. **1** 24).

Consequently, Plaintiffs have stated and the ERS must concede the alleged essential elements contained in the allegations that James Tietjen had a cognizable property right interest in his pension benefits calculated using his accrued 32.30056 years of service credit.

* 1. **James Tietjen was deprived of that property interest by the conduct of the Defendants.**

Plaintiffs have further alleged, and the ERS concedes:

1. That after James Tietjen made his pension benefit selection based upon the information given to him by Defendants, including that he unequivocally had accrued 32.30056 years of service credit, Defendants secretly, knowingly and wrongfully used a number lower than 32.30056 years of service credit to calculate his pension

# benefit and thereby reduced his monthly pension benefit. (AMENDED COMPLAINT, 26).

1. That during the course of JAMES TIETJEN's employment by Milwaukee County Defendants further reduced his accrued years of service credit without advising *JAMES* TIETJEN of obtaining his consent or knowing voluntary agreement, and without payment of just compensation, contrary to the 5th Amendment to the U. S.

Constitutio.n (AMENDED COMPLAINT, 30).

Consequently, Plaintiffs have alleged and the ERS must concede the essential elements to allege that James Tietjen was deprived by the conduct of the Defendants of his cognizable property right interest in his pension benefit calculated using his accrued 32.30056 year, and further reduced his credit for years of service credit in another instance.

* 1. **Defendants' deprivation of James Tietjen's property right interest was without due process.**

The issue of whether deprivation of a property right interest occurred without due process requires consideration of the property right interest that was affected by the official action, the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. **Mann,** supra., at p. 879 citing **Mathews v. Eldridge,** 424 U. S. 319, 335, 96 S. Ct. 893, 47

L. Ed 2d 18 (1976).

Here Plaintiffs' allegations of a lack of due process are simple

- that Defendants took a portion of James Tietjen's selected pension benefit without his knowledge or consent.

Plaintiffs allege, and the ERS must concede:

* + 1. That there is only one process by which Defendants could diminish or impair the vested right of an ERS member such as James Tietjen to his retirement benefits - by obtaining James Tietjen's consent. (AMENDED COMPLAINT, 14-15);
    2. That Defendants did diminish James Tietjen's pension benefit by secretly and intentionally reducing his years of service credit number used in calculating that benefit. (AMENDED COMPLAINT, 26); and
    3. That such diminishment was done without James Tietjen's consent. (AMENDED COMPLAINT, 28).
    4. That for at least the past 25 years Defendants have engaged in such wrongful conduct described above towards each retiring employee of Milwaukee and members of the Plaintiff Classes, described below, in exactly the same way as they have wrongfully acted against JAMES and DEBRA TIETJEN as described above. (AMENDED COMPLAINT, 38).

Applying the considerations of due process from **Mann,** supra. and **Mathews,** supra. detailed above: First, James Tietjen's constitutionally protected property right interest in his undiminished retirement benefit was deliberately diminished by the Defendants secret, wrongful intentional conduct - they stole a portion of James Tietjen's monthly pension benefit by secretly reducing the calculation of that benefit.

# Secondly, as to the risk of this being done again without the imposition of safeguards, Plaintiffs alleged and the ERS must concede that the Defendants have engaged in this same conduct for at least the last 25 years with each retiring Milwaukee County employee. (AMENDED

COMPLAINT, 38). The need is obvious for the safeguard of the Defendants being compelled to follow the process of obtaining a retiree's consent

before diminishing or impairing the retiree's accrued retirement benefit.

Lastly, as to the Government's interest and any burden on the Government, the ERS, as well as the other Defendant cannot argue that

they have a: legitimate interest in secretly taking money ,from retiree's

retirement benefits, or that to refrain from doing so would be an unwarranted burden.

Plaintiffs have alleged a Cause of Action under 42 U.S.C. §1983 against the Defendants for depriving James Tietjen of his constitutionally protected property right interest in the retirement benefit he selected upon the unequivocal advice of the Defendants without the Defendants going through the required due process of obtaining his consent.

1. **Plaintiffs do not need to exhaust their administrative remedies.**

Plaintiffs are not obligated to exhaust administrative remedies in a 1983 action. In **Felder v. Casey,** 487 U. S. 131, 108 S. Ct. 2302, 101

1. Ed 2d 123 the Plaintiff brought an unreasonable force§ 1983 claim against a Milwaukee police officer. The trial Court denied Defendant's Motion to Dismiss the claim on the grounds that the Plaintiff had not exhausted his administrative remedies by filing a statutory NOTICE OF

The United State Supreme Court reversed, stating:

CLAIM with the City of Milwaukee. The Wisconsin Court of Appeals affirmed. The Wisconsin Supreme Court reversed and dismissed the case.

No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that *HN3* States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." *Brown* v. *Western R. Co. of Alabama,* 338 U.S. 294, 296(1949). The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to§ 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead "'stan[d]as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"? *Perez v. Campbell,* 402 U.S. 637, 649 (1971) (quoting *Hines* v.

*Davidowitz,* 312 U.S. ·52, 67 (1941)). Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when t\_here is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free* v. *Bland,* 369 U.S. 663, 666 (1962). **Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of§. 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the§ 1983 action is brought in a state court.** (Emphasis supplied).

**Id,** at p. 138. Also see **Shaw v. Leatherberry,** 2005 WI 163, **1** 38, 286

Wis. 2d 380, 706 N. W. 2d 299; **Horsley v. Trame,** 808 F. 3d 1126, 1130

{7t h Cir. 2015).

# Moreover, despite the ERS' argument to the contrary at p. 6 of its Brief, Plaintiffs have unequivocally alleged, and the ERS must concede that Plaintiffs do not need to exhaust any ERS, MILWAUKEE COUNTY or PENSION BOARD administrative remedies. In addition the authorities

relied upon by the ERS for this argument are contrary to the general rule in a§ 1983 action and are factually not in point.

A Plaintiff is excused from failing to pursue administrative remedies where pursuing those remedies would be futile. **Gallegos v. Mt. Sinai Medical Center,** 210 F. 3d 803, 808 (7 t h Cir. 2000), citing **Robyns**

* 1. Reliance Standard Life Ins. Co., 130 F. 3d 1231, 1236, (7t h Cir.

1997; Wilczynski v. Lumbermens Mutual Ins. Co., 93 F. 3d 397, 402 (7t h Cir. 1996; Smith v. Blue Cross & Shield United of Wisconsin, 959 F. 2d **655, 658-59 ( 7 t h Cir. 1992).**

Plaintiffs have alleged and the ERS must concede:

* + 1. That Plaintiffs and the members of the Plaintiff Classes are not required to exhaust any administrative remedies as to their claims against the Defendants because substantial Wisconsin and U. S. Constitution questions are involved. (AMENDED COMPLAINT, 1 51);
    2. That Plaintiffs are not required to exhaust any administrative remedies as to their claims against the Defendants because any such administrative remedy is inadequate to avoid irreparable harm

to the Plaintiffs. (AMENDED COMPLAINT, 1 52); and

* + 1. Plaintiffs are not required to exhaust any administrative remedies as to their claims against the Defendants because recourse to the administrative agency, the MILWAUKEE COUNTY PENSION BOARD, would be a futile and useless act. (AMENDED COMPLAINT, 1 53).

These factual allegations could not be more explicit in alleging the futility and the inadequacy of any administrative remedies offered by Milwaukee County, the ERS or the Milwaukee County PENSION BOARD.

# Moreover, the general rule is that a claimant need not exhaust administrative remedies before bringing a§ 1983 action:

There is no general duty to exhaust state judicial or administrative remedies before pursuing an action under 42

U.S.C. § 1983, however. *Patsy v. Bd. of Regents of State of Fla.,* 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) ("exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to§ 1983"); *see also Felder v. Casey,* 487 U.S. 131, 146-47, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988).

Horsley v. Trame, 808 F. 3d 1126, 1130 (7t h Cir. 20150.

Lastly, the authorities relied upon by the ERS, Kauth v. Hartford Ins. Co. of Ill., 852 F. 2d 951, 955-6 (7t h Cir. 1988), Baldwin v. Milwaukee County, Case No. 15-C-0517, 2015 WL 639382 (E. D. Wis. Oct. 22, 2015) and Mecouch v. Pension Board of the Employees Retirement System of the County of Milwaukee, 184 F. Supp. 3d 684 (E.D. Wis. 2016) are all factually distinguishable in that in each of those cases the Plaintiff made no allegation that the available administrative remedy available was inadequate: "Kauth does not claim that the available state remedies are constitutionally inadequate." **Kauth,** supra. at p. 955;

* "Baldwin does not suggest that certiorari review in state court is somehow inadequate process." **Baldwin,** supra., p. 8; "Further, (Mecouch) does not allege the inadequacy of certiorari review;" **Mecouch,** supra. at p. 677.

As shown above, here the Plaintiffs have alleged that they need not exhaust administrative remedies because substantial Wisconsin and

u. s. Constitution questions are involved, because any such

administrative remedy is inadequate to avoid irreparable harm to the Plaintiffs, and because recourse to the administrative agency, the

MILWAUKEE COUNTY PENSION BOARD, would be a futile and useless act. These are fact allegations which the Defendants must concede for purposes of their Rule 12(b)(6) Motions.

Plaintiffs do not have to exhaust their administrative remedies before bringing this§ 1983 action.

1. **Plaintiffs' Taking Claim**

The argument of the ERS that the Plaintiffs' Taking Claim is premised solely on its argument that the Plaintiff has failed to exhaust administrative remedies and therefore cannot proceed on their federal constitutional claims. The ERS does not argue that there has been no taking of James Tietjen's property right interests. It does not argue that it did not participate with the other Defendants in secretly reducing James Tietjen' s accrued retirement benefit property right interests without his knowledge or consent. Indeed, none of the Defendants can make this argument, since they must concede the specific allegations of the Plaintiffs in this regard:

1. That during the course of JAMES TIETJEN's employment by Milwaukee County Defendants further reduced his accrued years of service credit without advising JAMES TIETJEN of obtaining his consent or knowing voluntary agreement, and without payment of just compensation, contrary to the 5th Amendment to the U. S. Constitution. (AMENDED COMPLAINT, 30; Also see 32, 35). Plaintiffs have rebutted at pp. 7-9 above the ERS' argument on

Plaintiffs' Taking Claim premised solely on the failure to exhaust administrative remedies.

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1. Plaintiffs' state law claims

The argument of the ERS for dismissal of Plaintiffs' state law claims is premised solely on their argument that Plaintiffs' § 1983 claims should be dismissed. Plaintiffs have demonstrated above why those arguments should fail and Plaintiffs' § 1983 claims not be dismissed. Plaintiffs incorporate those arguments here.

**CONCLUSION**

Upon the above argument and authorities cited it is respectfully submitted that the Rule 12(b)(6) Motion of the ERS should be denied.

Dated this 30t h day of March, 2017.

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